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**VIA EMAIL AND REGULAR MAIL**

Michelle Marcu  
Enforcement Attorney  
US EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

**Re: Freedom of Information Act Requests – Pavillion Field Area**

Dear Michelle:

As you and I have discussed repeatedly, we, as counsel for Encana Oil & Gas (USA) Inc. ("Encana"), are very concerned about the US Environmental Protection Agency's ("EPA's") continued failure to expeditiously and fully respond to our December 2011 Freedom of Information Act ("FOIA") request letters to the EPA regarding the EPA's draft report on groundwater quality in the Pavillion Field Area ("Draft Report").

On December 16, 2011, you requested and Betsy Temkin and I identified priority documents for EPA's response. The overriding priority was data first and communications second. More specifically, we agreed that the information requests 1.1 through 1.14 in the Region 8 FOIA letter were of higher priority than requests 1.15 through 1.20. After learning that Region 8 would manage responses by Region 3, Office of Research and Development, and Kerr Laboratories, we confirmed that EPA would apply a similar prioritization to the other three FOIA letters. Since then, we have had numerous conversations with EPA confirming those priorities, answered your questions, and prepared an Excel spreadsheet to help expedite EPA's response.

On January 31, 2012, EPA finally posted on its website certain responsive records. A few more records were posted on EPA's website later last week. However, those postings and records do not include many of the priority records. We have also not yet received EPA's required response, with a complete or partial schedule for responding to our requests and EPA's position on costs. Yesterday, you and Mike Boydston advised me that the letter is still under review internally.

The continuing delays are untenable under FOIA and preclude interested stakeholders from undertaking a fair and complete review of the Draft Report. We are eight weeks into this process and we are still without key data and related records. For example, as early as December 20, 2011 we advised EPA of the need to make available EPA's mass spectra data and that we would "appreciate Region 8's providing the mass spectra this week [December 20 – 24] or next week [December 27-30] if at all possible." EPA still has not provided any of its mass spectra data; two months after EPA issued the Draft Report. Another example is during our December 20, 2011 telephone conference, we requested the soil gas data as a priority. We still have not received any soil gas data from EPA, even though Objective 2 of Phase 3 specifically addressed soil gas data.

In a further effort to focus EPA's production of the requested documents, we request that EPA give top and urgent priority to the following specific records:<sup>1</sup>

1. ***Method validation work for all non-CLP analyses***, including di- through heptaethylene glycol, adamantane and methyl-adamantane, tri(2-butoxyethyl) phosphate, squalene, caprolactam, and 2-butoxyethanol phosphate. EPA's not having provided these documents is particularly troublesome given Regional Administrator Martin's testimony last week that EPA used its standard procedures, when these analytical methods are not EPA's standard methods.
2. ***For CLP analyses, Level 4 data packages and associated validation packages***. These records are critical to the evaluation of the Draft Report and are an essential element of transparency.
3. Documentation (including field notes and chain of custody records) of ***the specific locations at which the July 7, 2011 PAV 01 and PAV 02 water samples were obtained***. EPA's procedures require that the source of samples be identified and yet these samples do not have any such identification in any records that EPA has provided to date.
4. All ***soil gas data and analyses***, see above.
5. All ***mass spectra data***, see above.
6. Records of or related to all ***"citizens' complaints of taste and odor problems"*** referenced on page 39 of the Draft Report. Also, the Congressional Research Service's January 25, 2012 report on the Draft Report references at page 1 and elsewhere "a public petition." If such a record exists, that should be provided.

The Draft Report obviously has become a matter of substantial public interest. Encana has been requesting records relating to each phase of the investigation since the investigation

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<sup>1</sup> In identifying these priorities (as well as those previously provided), we do not in any way waive responses to all of our December FOIA requests nor do we agree, EPA's protestations notwithstanding, that EPA has been responsive to our FOIA requests.



began several years ago. Those records should have been provided as Encana requested them. At the very least, EPA should have provided the public with the full documentation of the information on which EPA relied simultaneously with the release of the Draft Report. Unless the documentation is made available very soon, EPA will have to extend the public comment and suspend the peer review process to ensure both processes serve their intended purpose. To do otherwise is to politicize the scientific review process and bias it in EPA's favor.

EPA has warned repeatedly that the cost of responding to our FOIA requests will be substantial. Meanwhile, over the last two months, a number of public figures and organizations have requested that EPA make available the very same information this firm has requested in order to support the public comment and peer review process. At this point, the requested documentation should be made available, in the public interest, free of any charge, as provided for under 40 C.F.R. § 2.107(1), as the requested information is essential to meaningful public comment and a meaningful peer review and clearly satisfies the other criteria for a public interest fee waiver.

On the issue of costs, you have said that responding to the FOIA requests requires substantial commitments throughout the Agency for lawyer time to review records for "privilege" and other legal considerations before EPA provides them. However, most of the requested documents are highly technical scientific documentation of the investigation or communications among technical or scientific personnel. EPA's technical staff is fully capable of identifying and providing such documents, and very little attorney review of them should be necessary.

Given all the time that has passed since the FOIA requests were submitted and the numerous conversations, we anticipate at this point receiving the priority records, a schedule for the other requested records, and detailed cost estimates in the next couple of days. We also look forward to receiving all of the responsive documents in time for our client and others to review and evaluate them for both the public comment and peer review processes. If the requested documents are not made available very soon, we will request that EPA extend the public comment period on the draft report to accommodate the review and evaluation of the missing information.

Very truly yours,



Linnea Brown

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